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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JESSE TALBOT JOHNSON, Defendant and Appellant.	2d Crim. No. B214088 (Super. Ct. No. 2008027733) (Ventura County)

Jesse Talbot Johnson appeals a judgment of conviction of making criminal threats. (Pen. Code, § 422.)[1] We affirm.

FACTS AND PROCEDURAL HISTORY

Johnson and Heather Shields dated for two years. In October 2006, they moved to Los Osos, and in 2008 Shields gave birth to their son, N.

Later that year, the relationship between Johnson and Shields deteriorated. When Johnson argued with Shields in a restaurant concerning a visit to Ventura, he threw a drink at her. Shields and N. then moved to Newbury Park and lived with her father.

Johnson pursued Shields to Camarillo and the couple resumed living together. On April 12, 2008, Johnson struck Shields in the face after she refused to make

[1] All statutory references are to the Penal Code.

breakfast. She suffered facial bruises but did not complain to police officers because she feared Johnson.

On May 6, 2008, Johnson struck Shields twice because she informed him that she intended to visit her mother. Shields suffered a bruise, a cut lip, and a black eye. Thereafter she and N. resumed living with her father. Shields applied for a temporary restraining order against Johnson, but did not complete the application because he stated that he intended to move to Reno, Nevada.

On June 5, 2008, Johnson made a farewell visit to Shields. When he left, he kicked and dented her automobile.

After Johnson moved to Reno, he and Shields spoke frequently. He urged that they reunite and that Shields move to Reno. She declined and stated that she was concerned about his violent behavior and that she would not leave her family.

On June 25, 2008, Johnson telephoned Shields and stated that he desired custody of N., then five months old. When Shields refused, he became angry.

Later that day, Johnson telephoned Shields and left many threatening voicemails. He stated that he would "slash [her] face open so [she] could never look in a mirror again," that he would "shoot her with a shotgun, bash [her] face in with a baseball bat, [and] bash [her] teeth out." He also threatened to kill her father and brother. In one message, Johnson sang the lyrics to a popular song: "I used to love her, but I had to kill her, and . . . [now she is buried] six feet under." Johnson also stated that he was "ready to die" and was "takin' motherfuckers out with [him]." Shields knew that Johnson had inherited firearms, including a shotgun. Frightened, she complained to police officers.

At the urging of police officers, Shields placed a telephone call to Johnson and confronted him regarding the voicemails. The conversation was recorded. Johnson stated that he made the threats because he "was just pissed." He also stated that he was not planning to visit Ventura. Shields did not believe him, however, because she thought he was unpredictable.

Shields obtained a temporary restraining order against Johnson because she was frightened. She sent him a text message informing him of the restraining order. On June 27 and 28, 2008, Johnson and Shields corresponded by text message approximately 120 times, most messages written by Johnson.

On July 7, 2008, Johnson telephoned Shields and left voicemails stating that he intended to shoot himself. He stated that he was then driving in his vehicle. Shields reported the voicemails to police officers.

Ventura Sheriff's Deputy Luis Vasquez telephoned Johnson and asked whether he had a gun. Johnson refused to answer and declined to state his location. Vasquez heard background traffic noise and arranged for a tap on Johnson's cellular telephone. Police officers later tracked Johnson's telephone signal near Hayward, California. Police officers stopped and arrested him in Gilroy, California.

Johnson testified and admitted striking Shields in prior incidents. He stated that he "tend[ed] to not vent [his] emotions properly." Johnson testified that he left the threatening voicemails because Shields would not answer her telephone. He stated that he and Shields communicated frequently following his move to Reno and that she discussed moving there with their child. Johnson testified that he did not intend to carry out the threats expressed in the voicemails.

At trial, the prosecutor played a recording of Johnson's June 25, 2008, voicemail messages as well as the June 26, 2008, police-recorded telephone call that Shields placed to Johnson.

The jury convicted Johnson of making criminal threats. (§ 422.) Following the verdict, Johnson admitted suffering two prior convictions. (§ 1203, subd. (e)(4).) The court sentenced Johnson to an upper term of three years and awarded him 326 days of presentence custody credits. In imposing sentence, the trial judge described Johnson's voicemail messages as "the most chilling and scary phone conversations I've heard in my career of over 30 years."

The trial court's minute order and the abstract of judgment reflect imposition of a $200 restitution fine, a stayed $200 parole revocation restitution fine, a $20 court security fee, and a $1,885 probation investigation fee. (§§ 1202.4, subd. (b), 1202.45, 1465.8, 1203.1b.) The court did not expressly impose the fines and fees during sentencing. Instead, it referred to "[a]ll other terms of probation are imposed as terms of the sentence."

Johnson appeals and contends that 1) the trial court abused its discretion by denying a continuance to subpoena text messages and 2) the trial court erred by imposing fines and fees that it did not orally pronounce during sentencing.

DISCUSSION

I.

Johnson asserts that the trial court abused its discretion by denying his request for a continuance to subpoena the content of Shields's text messages. He points out that he subpoenaed Shields's cellular telephone records prior to trial, but the records received in response did not contain the content of her text messages. Johnson argues that the content would tend to establish that Shields did not fear his threats. He contends that the denial of a continuance denied him the reasonable opportunity to prepare a defense and is prejudicial. (*People v. Snow* (2003) 30 Cal.4th 43, 70 [error to deny defendant a reasonable opportunity to prepare].)

On the second day of trial, prior to swearing of the jury, Johnson moved for a continuance to subpoena the content of Shields's text messages. The trial court denied the request, stating that it was untimely and that the prosecutor's witnesses then were assembled for testimony. The court also noted "the inconsistency of [Johnson] not wanting to waive time, but . . . now wanting some discovery."

It is in the trial court's sound discretion to determine whether a continuance should be granted, but the court must not exercise its discretion to deprive the defendant of a reasonable opportunity to prepare. (*People v. Jackson* (2009) 45 Cal.4th 662, 677-678.) The trial court abuses its discretion if its ruling is unreasonable. (*People v. Beames*

(2007) 40 Cal.4th 907, 920.) "The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked." (*Ibid.*)

Johnson has not established that the trial court abused its discretion by denying his request. Shields testified that she sent text messages to Johnson "[t]o keep him calm" and "not . . . enrage him even more." Shields stated that "[i]f [she] ignored [Johnson], it would make things worse for [her]." Thus the content of the text messages would not tend to disprove Shields's fear of Johnson, given her testimony explaining why she responded to his messages. Moreover, the prosecution's witnesses had been summoned and were prepared to testify. Under the circumstances, the trial court's ruling was reasonable. (*People v. Beames*, *supra*, 40 Cal.4th 907, 921 [whether denial of request for continuance is unreasonable dependent upon the circumstances of the case].)

II.

Johnson challenges the restitution fines and probation investigation fees set forth in the trial court's minute order and abstract of judgment. He asserts that the court did not orally pronounce imposition of the fines and fees. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200 ["Although we recognize that a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts").) Johnson relies upon *People v. Zackery* (2007) 147 Cal.App.4th 380, 387-388, concluding that the court clerk may not supplement the judgment by adding restitution fines to the minute order and abstract of judgment. (*Id.* at p. 389 ["The restitution fines could not be simply added to the judgment later outside defendant's presence"].) He adds that there is insufficient evidence of his ability to pay probation investigation fees.

The trial court's oral pronouncement of sentence does not conflict with the court minutes or the abstract of judgment. At sentencing, the court incorporated by reference the terms set forth in the probation report. The court's reference to "[a]ll other terms of probation" obviously meant "[a]ll other terms of [the] probation [report],"

because the probation report recommended against a grant of probation. The report recommends a $200 restitution fine, a $200 parole revocation restitution fine, and a $1,885 probation investigation fee.

Assuming that the trial court should have pronounced the amount of the fees and fines orally, any error is reviewed pursuant to the harmless error standard for noncapital sentencing errors. (*People v. Price* (1991) 1 Cal.4th 324, 492; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.) Here there is no reasonable probability that Johnson would have obtained a more favorable result had the court orally pronounced imposition of the fines and fees. The trial court imposed an upper-term sentence and remarked that Johnson's voicemails were "the most chilling and scary" that the court had heard. The court's comments reflect that it did not view Johnson sympathetically and that it did not intend leniency in sentencing. (§ 1202.4, subd. (b) ["[T]he court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so"].) The restitution fines are mandatory and the probation report recommended imposition of the minimum amount. (*Ibid.*)

People v. Zackery, *supra*, 147 Cal.App.4th 380 is distinguishable. There the trial court imposed sentence (a fine) for a nonexistent conviction and the clerk added other fines to the minute order and abstract of judgment without a reference or oral pronouncement. On review, the court concluded that the case was "replete with errors" (*id.* at p. 384) and that "the clerk's minutes must accurately reflect what occurred at the hearing" (*id.* at p. 388).

Moreover, Johnson has forfeited his claims regarding his ability to pay the probation investigation fee, or the absence of an advisement regarding a hearing on the issue. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1075-1076 [defendant's failure to object at sentencing to noncompliance with the probation procedures of section 1203.1b waives the claim on appeal].) The probation report here recommended imposition of a fee, defense counsel had an opportunity to review the report and recommendations and argued on behalf of Johnson before the court imposed sentence.

Having failed to object to imposition of the fee by the court's reference to the probation report, Johnson cannot complain now. (*Ibid.*)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Bruce A. Young, Judge

Superior Court County of Ventura

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